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No. 10-557

Supreme Court, U.S.
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In The

Supreme Court of the United States

WAEL MOHAMED ABDEL-LATIF,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred in defining the term "persecution," as used in 8 U.S.C. § 1101(a)(42)(A), to mean harm or suffering done to punish an individual for a belief or characteristic which the persecutor seeks to overcome.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in treating Petitioner Abdel-Latif's request for withholding of removal relief as a subset of the proof needed to prove his entitlement to relief under the Convention Against Torture.

LIST OF PARTIES

The name of the Petitioner is:

Wael Mohamed Abdel-Latif

The name of the Respondent is:

Eric H. Holder, Jr., U.S. Attorney General

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Wael Mohamed Abdel-Latif, petitions the Court for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Fifth Circuit (entered on July 26, 2010) which affirmed the Board of Immigration Appeals ("BIA") decision and denied his Petition for Review.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Davis, Smith, and Southwick, JJ.) is not reported and is included in the Appendix at App. 1. The final decision of the Board of Immigration Appeals ("BIA") is also not reported and is reproduced in the Appendix at App. 5.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 26, 2010. *See* App. 3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. § 1101(a)(42)(A):

   The term "refugee" means:

   (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

2. 8 U.S.C. § 1231(b)(3)(A):

   Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

3. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, Tit. XXII, § 2242, 112 Stat. 2681,

2681-761, 2681-822 (codified as a note to 8 U.S.C. § 1231).

STATEMENT OF THE CASE

The United States Court of Appeals for the Fifth Circuit overruled Petitioner's Abdel-Latif's complaint on appeal that the Board of Immigration Affairs ("BIA") erred in adopting the Immigration Judge's ("IJ's") definition of "persecution" with respect to Abdel-Latif's withholding of removal claim. It also upheld the BIA's denial of relief as to Abdel-Latif's Convention Against Torture claim. The evidence relied on by the BIA established that Abdel-Latif, a past member of the Muslim Brotherhood, was detained, continually beaten, and threatened for a 12-14 hour period by SSI officers (a police force of the Egyptian Government) because of his participation in a rally on the Alexandria college campus organized by the Muslim Brotherhood. The Muslim Brotherhood is a peaceful, political organization which has for many years been outlawed by the Egyptian Government. The BIA adopted the IJ's interpretation of the term "persecution," as used in the definition of "refugee" codified by § 101(a)(42) of the Immigration & Nationality Act ("INA") (8 U.S.C. § 1101(a)(42)(A)). The IJ defined "persecution" in the following manner:

> The first question which concerns the question [sic] is whether or not the respondent in fact suffered persecution. Actions can be persecution if the harm or suffering was done to

> punish an individual for a belief or characteristic which the persecutor seeks to overcome. *Matter of Acosta*, 19 I & N Dec. 211, 223 (BIA 1985). *Admin. Rec. 70-71.*
>
> . . .
>
> The testimony and the exhibits are simply insufficient to reflect that the single arrest of this respondent was persecution designed or intended by the persecutor to overcome any characteristic or belief, political or otherwise. *Admin. Rec. 72.*

In affirming the correctness of the IJ's definition of "persecution," the Fifth Circuit ignored Abdel-Latif's complaint on appeal that the BIA erred in adopting the IJ's definition of "persecution." The Fifth Circuit instead cited to its earlier decision in *Roy v. Ashcroft*, 389 F.3d 132, 138 (5th Cir. 2004) for the definition it was relying on, which in turn cited to its earlier decision in *Faddoul v. INS*, 37 F.3d 185, 188 (5th Cir. 1994). In *Roy v. Ashcroft*, the Fifth Circuit stated: "Persecution has been construed as requiring a showing that 'harm or suffering will be inflicted upon [him] in order to punish [him] for possession of a belief or characteristic a persecutor sought to overcome.'" *Id.*, at 138. In *Faddoul v. INS*, the Fifth Circuit defined the term the same way: "While the INA does not provide a precise definition of persecution, we have construed the term as requiring 'a showing by the alien that "harm or suffering will be inflicted upon [her] in order to punish [her] for possessing a

belief or characteristic a persecutor sought to overcome."'" *Id.*, at 188.

The Fifth Circuit adopted this definition from dicta found in the BIA decision in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).[1] There, the BIA defined "persecution" to mean "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Id.*, at 222. However, the BIA then went on to expound upon this definition through dicta in the next paragraph of its written decision by stating: "Two significant aspects of this accepted construction of the term were as follows: First, harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome. . . ." *Id.*, at 222-223. The Fifth Circuit thus erred in adopting a "persecution" definition based on the dicta portion of the BIA decision in *Matter of Acosta*, rather than relying on the definition the BIA actually provided in that decision.

By citing to *Roy v. Ashcroft*, *supra*, the Fifth Circuit rejected Abdel-Latif's contention on appeal that the BIA improperly relied on its decision in

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[1] In *Faddoul*, *supra*, the Fifth Circuit cited to *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986) as the case upon which its definition of "persecution" was based. The *Guevara* case in turn cites to *Matter of Acosta*, BIA Interim Decision No. 2986, 1985 WL 56042 (March 1, 1985) as its authority for defining the term "persecution" in the manner in which the *Roy* and *Faddoul* cases defined the term.

Matter of Acosta in formulating its "persecution" definition. It also did not squarely address Abdel-Latif's argument in his appeal brief that the definition of "persecution" which should have been used was the definition of "persecution" the Fifth Circuit had previously adopted in *Abdel-Masieh v. INS*, 73 F.3d 579, 583-84 (5th Cir. 1996), to wit:

> The infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life. *Abdel-Masieh, supra,* at 583-84 (5th Cir. 1996)

The Fifth Circuit further ruled that Abdel-Latif was not entitled to relief under the CAT (Convention Against Torture) because he had failed to demonstrate his entitlement to withholding of removal relief. (*See* App. 2).

REASONS FOR GRANTING THE WRIT

1. **There is a split of authority in the way the Court of Appeals for the Fifth Circuit has defined "persecution" (as used in the definition of "refugee" under the INA) and the way most (if not all) other Circuit Courts have defined the term, as these Courts have not imposed any requirement that the alien prove that he or she was punished or that he or she "possessed a belief or characteristic which a persecutor sought to overcome" as a condition of proving that "persecution" occurred.**

The current definition of "persecution" adopted by the United States Court of Appeals for the Fifth Circuit conflicts with the definition most, if not all, of the other U.S. Circuit Courts of Appeals have given the term. Unlike the Fifth Circuit, these United States Courts of Appeals have utilized a plain meaning rule analysis to define the term and have not engrafted onto the definition of "persecution" any requirement that an alien prove that his or her persecutor was motivated by a desire to "punish" him or her or that said persecutor sought to overcome a belief or characteristic held by the alien which was deemed offensive. This part of the Fifth Circuit definition, taken from dicta in the *Matter of Acosta* decision, has been disregarded by the other United States Circuit Courts in crafting their definition of the term. They have instead restricted the meaning of the term "persecution," as used in the definition of

"refugee" under § 101(a)(42) of the INA, by describing the term as a reference to extreme conduct rising to the level of physical harm, suffering, and/or threats inflicted on or directed toward an alien on account of a protected political ground. The First Circuit, for example, has stated that the term "persecution," as used in this provision of the INA, "requires that the totality of a petitioner's experiences add up to more than mere discomfiture, unpleasantness, harassment, or unfair treatment," *Nikijuluw v. Gonzales*, 427 F.3d 115, 120 (1st Cir. 2005), a "threshold [that] is not easily crossed," *Orelien v. Gonzales*, 467 F.3d 67, 71 (1st Cir. 2006).

The Second Circuit has stated that persecution "includes 'more than threats to life and freedom,'" *Chen v. INS*, 359 F.3d 121, 128 (2d Cir. 2004) and therefore encompasses a variety of forms of adverse treatment, including "non-life[-]threatening violence and physical abuse," *Chen*, 359 F.3d at 128, or non-physical forms of harm such as "the deliberate imposition of a substantial economic disadvantage," *Guan Shan Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 67 (2d Cir. 2002). The Third Circuit has defined persecution as "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom." *See Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

The Sixth Circuit has held that "persecution," as used in the statute, "'requires more than a few isolated incidents of verbal harassment or intimidation,

unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty.'" *Gilaj v. Gonzales*, 408 F.3d 275, 284 (6th Cir. 2005).

The Seventh Circuit has defined the term as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate." *Bace v. Ashcroft*, 352 F.3d 1133, 1137 (7th Cir. 2003).

The Eighth Circuit, in *Rife v. Ashcroft*, 374 F.3d 606, 612 (8th Cir. 2004), stated that the term "persecution" means the "infliction or threat of death, torture, or injury to one's person or freedom on account of a statutory ground (defining persecution as 'the infliction of suffering or harm upon those who differ (in race, religion, or political opinion') in a way regarded as offensive.'"

In the Ninth Circuit, the term persecution is defined as "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive." *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc).

The Tenth Circuit has adopted the same definition as the Ninth Circuit in *Chaib v. Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005).

The Eleventh Circuit has defined the term "persecution" as "an extreme concept, requiring more than a few isolated incidents of verbal harassment or intimidation." *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005).

Review is necessary to resolve this conflict which exists between the Fifth Circuit and the other United States Circuit Courts: The issue which must be decided is whether the meaning of the term "persecution," as used in § 101(a)(42) of the INA, is limited to one of the substantially similar "plain meaning" definitions United States Courts of Appeals other than the Fifth Circuit have adopted, to wit: extreme conduct amounting to "harm, threats, or punishment" on account of a protected ground; or whether the Fifth Circuit definition of "persecution" is the correct definition. If the Fifth Circuit definition is the correct one, the alien must not only show that he or she was harmed, punished, or threatened and subjected to extreme conduct on account of a protected ground, but prove that the extreme conduct directed toward him or her was specifically undertaken with the motive and purpose of punishment. Further, the alien must prove that the persecutor's intent and motivation by inflicting the extreme harm, suffering, or punishment was to overcome or change a belief or characteristic held by the alien.

Abdel-Latif asserts the Fifth Circuit definition of "persecution," which is based on dicta, should be struck down because it disregards the plain meaning rule and supplants and renders meaningless the "on account of" nexus test created in the INA definition of "refugee." It is this "on account of" language in the "refugee" definition which establishes the connection which must be drawn between government-sponsored "persecution" and one of the five protected grounds

listed in the statute (i.e., race, religion, nationality, and/or membership in a particular social group or political opinion) – not the connection drawn by the Fifth Circuit's definition of "persecution." The Fifth's Circuit's definition is also untenable for a third reason. Under the meaning it has given the term "persecution," any alien harmed or threatened because of a belief or characteristic related to one of the five protected grounds (to include being threatened with his or her life) would not be entitled to seek asylum or withholding of removal relief unless: (1) he or she could prove that the persecutor was motivated by a desire to punish him or her; (2) show that the persecutor's intentions were to convert or otherwise change his or her belief or a characteristic; and (3) prove that it was the overall objective of the persecutor to seek to overcome this undesirable belief or characteristic.

By holding that "[p]ersecution has been construed as requiring a showing that 'harm or suffering will be inflicted upon [the alien] in order to punish [him or her] for possession of a belief or characteristic a persecutor sought to overcome,'" (*Roy v. Ashcroft, supra*, at 138), the Fifth Circuit has imposed proof requirements on an alien who seeks to establish that he or she was "persecuted" which are not recognized by other United States Circuit Courts. These additional proof requirements will in many cases prevent an alien who would otherwise qualify for asylum or withholding of removal relief from ever qualifying for such relief. Government sponsored conduct calculated to inflict pain or suffering on a person in order to

punish him on account of the characteristic of his or her "race" is one such example. Under the Fifth Circuit's definition of "persecution," no alien harmed or forced to endure suffering because of his or her race could ever qualify for asylum or withholding of removal relief under this protected ground since "race" is an immutable characteristic which no persecutor could ever seek to change or overcome.

For this and the other above stated reasons, the Fifth Circuit's strained and unworkable definition of the term "persecution" should be struck down.

2. The Fifth Circuit's treatment of Abdel-Latif's application for relief under the Convention Against Torture as a subset of his application for withholding of removal relief conflicts with applicable decisions of other United States Courts of Appeals.

The United States Court of Appeals for the Fifth Circuit, in addressing Abdel-Latif's Convention Against Torture claim, stated: "Latif also argues that he demonstrated that it is more likely than not that, on account of his past membership in the MB [Muslim Brotherhood], he will be tortured upon his return to Egypt." It then held: "Because he has not shown that he is entitled to withholding of removal, he has not demonstrated that he can meet the higher standard for obtaining relief under the CAT." As such, the Fifth Circuit relied upon the same analysis it applied to Abdel-Latif's withholding of removal claim in concluding that Abdel-Latif failed to demonstrate his

entitlement to relief under the Convention Against Torture.

This holding by the Fifth Circuit conflicts with the decision of the United States Court of Appeals for the Ninth Circuit in *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001), which specifically recognized that a claim under the Convention Against Torture is not a subset of a claim for either asylum or withholding of removal relief, but a different claim altogether. The Fifth Circuit's decision also conflicts with the Third Circuit's decision in *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003), which adopted the same analysis as in *Kamalthas*. Both Circuit Court decisions recognize that an alien's application for relief under CAT is analytically different from an asylum or withholding or removal claim and not a subset of either type of claim. The decision of the Fifth Circuit to treat Abdel-Latif's CAT claim as a subset of his withholding of removal claim for relief thus conflicts with the well-settled law of other United States Circuit Courts, which have emphasized that an alien's application for relief under CAT should be separately and distinctly analyzed from an alien's claim for asylum or withholding of removal relief.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60623
Summary Calendar

WAEL MOHAMED ABDEL LATIF,

Petitioner,

versus

ERIC H. HOLDER, JR., U.S. Attorney General,

Respondent.

Petition for Review of an Order of
the Board of Immigration Appeals
No. A 078 524 720

(Filed July 26, 2010)

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Wael Latif, a native and citizen of Egypt, petitions for review of a decision of the Board of Immigration

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appeals ("BIA"), which affirmed a decision of the Immigration Judge ("IJ)" denying Latif's application for withholding of removal and relief under the Convention Against Torture ("CAT"). Latif argues that he demonstrated past persecution and a well-founded fear of future persecution as a result of his activities in the Muslim Brotherhood ("MB"), a government-banned political group.

Latif was detained once for a 12- to 14-hour period and was beaten during his detention. During the three-month period between his detention and his departure from Egypt, he was not bothered again. He has not associated with any MB members since his arrival in this country, and there is at least a small minority of parliamentary members in Egypt who sympathize with the MB. Additionally, at the time of the hearing, Latif's mother still lived in Alexandria, his sister in Cairo. The BIA's determination is supported by substantial evidence, and the record does not compel a contrary conclusion. *See Roy v. Ashcroft*, 389 F.3d 132, 138 (5th Cir. 2004); *Efe v. Ashcroft*, 293 F.3d 899, 906 (5th Cir. 2002); 8 C.F.R. § 208.16(b).

Latif also argues that he demonstrated that it is more likely than not that, on account of his past membership in the MB, he will be tortured upon his return to Egypt. Because he has not shown that he is entitled to withholding of removal, he has not demonstrated that he can meet the higher standard for obtaining relief under the CAT. *See Efe*, 293 F.3d at 907. The petition for review is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60623
Summary Calendar

BIA Docket No. A078 524 720

WAEL MOHAMED ABDEL LATIF,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

JUDGMENT

(Filed July 26, 2010)

This cause was considered on the petition of Wael Mohamed Abdel Latif for review of an order of the Board of Immigration Appeals and the briefs on file.

It is ordered and adjudged that the petition for review is denied.

IT IS FURTHER ORDERED that petitioner pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the
Board of
Immigration Appeals

File: A078 524 720 – El Paso, TX

Date: JUL 28 2009

In re: WAEL MOHAMED ABDEL LATIF

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Marlene Gonzalez, Esquire

ON BEHALF OF DHS:

William M. Hunt
Assistant Chief Counsel

APPLICATION: Withholding of removal; protection under the Convention Against Torture

The respondent, a native and citizen of Egypt, has filed a timely appeal of the Immigration Judge's decision issued January 15, 2008. The respondent has filed a brief on appeal, which we have considered in making a determination in this case. The Department of Homeland Security (DHS) has filed a motion for summary affirmance. The factual findings of the Immigration Judge are reviewed to determine whether they are "clearly erroneous," while all other issues in appeals from decisions of Immigration Judges, including legal and discretionary determinations and

applications of law to fact, are reviewed *de novo*. *See* 8 C.F.R. § 1003.1(d)(3) (Board's standard of review). *See also Matter of V-K-*, 24 I&N Dec. 500, 501 (BIA 2008); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). The appeal will be dismissed.

We find no clear error in the factual findings of the Immigration Judge in this case. *See* 8 C.F.R. § 1003.1(d)(3).[1] Upon *de novo* review of the remaining issues presented in this instance, we uphold the Immigration Judge's finding that the respondent failed to qualify for a grant of withholding of removal[2] because he failed to establish a nexus to a protected ground under the Immigration and Nationality Act.[3] *See* section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42); section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (well-founded fear standard for asylum); *INS v.* Stevic, 467 U.S. 407 (1984) ("more likely than not" standard for withholding of removal);

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[1] Contrary to the respondent's assertion of factual error on appeal, the record does *not* contain any evidence that the respondent was questioned by the SSI or any other governmental authority regarding his political opinions (Tr. at 59-63, 99-101; Exh. 2, p. 6; Respondent's Appeal Brief, at 12-13).

[2] The Immigration Judge correctly pretermitted the respondent's application for asylum as having been untimely filed (I.J. at 5), and the respondent has not contested that finding on appeal. *See* 8 C.F.R. § 1208.4(a).

[3] The respondent's application for asylum and withholding of removal (Form I-589) was initially filed after May 11, 2005, and is therefore governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

Matter of J-B- & S-, 24 I&N Dec. 208 (BIA 2007) (protected ground must be "at least one central reason" for asylum claims governed by REAL ID Act). Here, the respondent was mistreated by SSI security agents who were seeking information regarding leaders of the Muslim Brotherhood who had held a demonstration on the college campus where the respondent attended university and in which the respondent had participated (I.J. at 2-3, 5-8). On appeal, the respondent asserts that he was targeted by SSI agents on account of his "membership in a political organization," the Muslim Brotherhood, and that the agents inferred that he should stop his activities in that organization (Respondent's Appeal Brief, at 12-13). However, we find that the Immigration Judge correctly concluded that the mistreatment occurred within the context of the agents' investigation attempting to obtain information about the leaders of the campus demonstration (I.J. at 2-3, 5-6). *See Matter of R-*, 20 I&N Dec. 621 (BIA 1992) (the mistreatment of a Sikh in Punjab by Indian police in the course of an investigation did not establish eligibility for asylum or withholding where the purpose of the mistreatment was to obtain information about Sikh militants who sought the violent overthrow of the Indian Government, rather than to punish him because of his political opinions or merely because he was a Sikh). *See Matter of R-*, *supra*, at 621-25. We also affirm the Immigration Judge's alternative finding that the respondent's single detention of 14 hours did not rise to the level of persecution (I.J. at 7-8).

The Immigration Judge also correctly denied protection under the Convention Against Torture, where the respondent failed to establish that he would more likely than not face torture by or with the acquiescence (to include the concept of willful blindness) of a member of the government of Egypt upon return to Egypt (I.J. at 8-11). *See* 8 C.F.R. §§ 1208.16-.18. Although the respondent argues on appeal that he was threatened with torture during his arrest and detention in 1996, he has failed to establish that Egyptian authorities would more likely than not torture him if he were returned to Egypt today (I.J. at 8-11). *Id. See also Matter of V-K-, supra*; *Matter of A-S-B-, supra*.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ Ray D. Paul
FOR THE BOARD

Supreme Court, U.S.
FILED
MAR 11 2011
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No. 10-557

In the Supreme Court of the United States

WAEL MOHAMED ABDEL-LATIF, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that substantial evidence supported the determination by the Board of Immigration Appeals that petitioner failed to establish eligibility for withholding of removal under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

2. Whether the court of appeals correctly held that substantial evidence supported the determination by the Board of Immigration Appeals that petitioner failed to establish eligibility for protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

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In the Supreme Court of the United States

No. 10-557

WAEL MOHAMED ABDEL-LATIF, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted in 390 Fed. Appx. 322. The decisions of the Board of Immigration Appeals (Pet. App. 5-8) and the immigration judge (App., *infra*, 1a-11a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2010. The petition for a writ of certiorari was filed on October 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in

their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

b. In addition, with exceptions not relevant here, the INA provides for the mandatory withholding of removal of an alien to a particular country if "the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3). An applicant who seeks to establish eligibility for withholding of removal must show that it is more likely than not that the applicant would face persecution on account of a protected ground upon removal to a particular country. 8 C.F.R. 1208.16(b); *INS* v. *Stevic*, 467 U.S. 407, 429-430 (1984). This is a more stringent standard than establishing a well-founded fear of persecution for purposes of asylum. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432 (1987).

An applicant who seeks withholding of removal can meet this burden in one of two ways. First, an applicant's demonstration that he has "suffered past persecution in the proposed country of removal on account of" an enumerated ground creates a rebuttable presumption that he would face future persecution if returned to that country. 8 C.F.R. 208.16(b)(1)(i), 1208.16(b)(1)(i). Sec-

ond, an applicant who has not suffered past persecution can offer other evidence "that it is more likely than not that he * * * would be persecuted on account of" an enumerated ground if he were removed to a particular country. 8 C.F.R. 208.16(b)(2), 1208.16(b)(2).

"Persecution" is not defined in the INA. The Board of Immigration Appeals (Board) has held that the term as used in the INA "clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome," but "does not embrace harm arising out of civil strife or anarchy." *In re Acosta*, 19 I. & N. Dec. 211, 223 (B.I.A. 1985), overruled in part on other grounds by *Cardoza-Fonseca*, 480 U.S. at 446. The Board has subsequently defined "persecution" as "the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim." *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (en banc). The Board has further explained that, while "many of [its] past cases involved actors who had a subjective intent to punish their victims," a "'punitive' or 'malignant' intent is not required for harm to constitute persecution." *Ibid.*

c. An alien who demonstrates that he would more likely than not be tortured if removed to a certain country may obtain protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85; see 8 C.F.R. 1208.16(c). Torture "is an extreme form of cruel and inhuman treatment" that "does not include lesser forms of cruel, inhuman or degrading

treatment or punishment that do not amount to torture." 8 C.F.R. 1208.18(a)(2); see 8 C.F.R. 1208(a)(1).

2. Petitioner is a native and citizen of Egypt who entered the United States on a visitor's visa in July 1996. App., *infra*, 2a. In 2006, the Department of Homeland Security charged him with being removable from the United States under Section 237(a)(1)(B) of the INA for remaining in the country for a time longer than permitted. *Ibid.*; Administrative Record (A.R.) 557-558. He came to the attention of Immigration and Customs Enforcement when Citizenship and Immigration Services suspected that he had engaged in marriage fraud to obtain immigration benefits. App., *infra*, 6a; A.R. 213-215. Before petitioner was placed in removal proceedings, he had never applied for asylum. App., *infra*, 6a. Based on petitioner's concession of removability, the immigration judge (IJ) found him removable as charged. *Id.* at 1a-2a.

Petitioner filed applications for asylum, withholding of removal, and protection under the CAT. App., *infra*, 2a-3a, 10a. He alleged that, after he attended a Muslim Brotherhood demonstration at a university in Alexandria, Egyptian State Security Intelligence (SSI) agents detained, beat, and threatened him because of his membership in the Muslim Brotherhood political party. *Id.* at 3a. He also alleged that the SSI agents made serious threats against his mother and sister. *Id.* at 7a. He testified that during that incident, he was questioned about his relationship with the Muslim Brotherhood and that he told "the truth about everybody" because he was scared. A.R. 144.

The immigration judge denied petitioner's application for withholding of removal because he failed to establish that he had been persecuted on account of a pro-

tected ground.[1] App., *infra*, 7a-8a. The IJ found that "[t]he evidence when viewed rationally points as strongly to the fact that the SSI officers * * * were trying to identify members or organizers of the demonstration rather than to punish [petitioner] for any belief or any perceived political belief." *Id.* at 7a. The IJ further explained that "[t]he testimony in this case does not reflect that [petitioner] was ever asked about any of his political beliefs or for that matter his role in the organization." *Ibid.* The IJ also observed that "[w]hat the testimony does reflect is that the police used strong armed tactics to obtain information regarding other members of the organization, their leadership roles, and their purposed [sic] planning of activities within the organization." *Ibid.*

The IJ also found that petitioner failed to demonstrate that any harm he suffered rose to the level of persecution. App., *infra*, 7a. In this regard, the IJ noted that petitioner did not seek medical treatment for the injuries he allegedly received during his detention. *Ibid.* The IJ further noted that petitioner was released from detention after fourteen hours and that neither he nor his mother or sister had had any contact with the SSI after his release. *Ibid.* The IJ thus determined that "[t]he testimony and the exhibits are simply insufficient to reflect that the single arrest of [petitioner] was persecution designed or intended by the persecutor to overcome any characteristic or belief, political or otherwise." *Ibid.* The IJ further noted that while he "[could not] and [did] not condone the interrogation and investigation techniques of members of the Egyptian government,

[1] The IJ did not rule on the merits of petitioner's asylum application because it was not filed within one year of his arrival in the United States, as the INA requires. See 8 U.S.C. 1158(a)(2)(B); App., *infra*, 5a.

[he] also [could not] determine that the events described were or equate to persecution as that term is legally defined and as that term is binding upon [the immigration] Court." *Ibid.* He thus concluded that "the evidence is insufficient to establish that it is more likely than not that [petitioner] would suffer persecution on account of one of the five statutory grounds were he to be returned to the country of Egypt." *Id.* at 7a-8a.

With regard to petitioner's application for CAT protection, the IJ found that the harm that petitioner experienced "cannot be considered as torture as that term is defined under the regulations." App., *infra*, 9a. The IJ reasoned that "[n]one of the injuries described resulted in medical treatment or hospitalization" and that petitioner's testimony merely reflected the SSI officers' efforts "to use fear as a motivating factor in order to obtain information from [him]." *Ibid.* The IJ also found that petitioner had not met his burden of establishing that it was more likely than not he would suffer torture if returned to Egypt. Specifically, the IJ noted that an expert witness who testified on petitioner's behalf did not offer an opinion on whether petitioner would be tortured by Egyptian authorities if returned to that country. *Id.* at 10a.

Accordingly, the IJ denied petitioner's applications for withholding of removal under the INA and for protection under the CAT and ordered him removed from the United States. App., *infra*, 10a.

3. Petitioner appealed the IJ's denial of withholding of removal and CAT protection, and the Board dismissed the appeal. Pet. App. 5-8. As an initial matter, the Board found no clear error in the IJ's factual findings. *Id.* at 6. Specifically, the Board observed that, contrary to petitioner's assertion, the record "does *not* contain

any evidence that [petitioner] was questioned by the SSI or any other governmental authority regarding his political opinions." *Id.* at 6 n.1.

The Board then upheld the IJ's determination that petitioner did not qualify for withholding of removal because "he failed to establish a nexus to a protected ground under the [INA]." Pet. App. 6. The Board acknowledged that petitioner "was mistreated by SSI security agents who were seeking information regarding leaders of the Muslim Brotherhood who had held a demonstration on the college campus where [petitioner] attended university and in which [petitioner] had participated." *Id.* at 7. But the Board found that the IJ had "correctly concluded that the mistreatment occurred within the context of the agents' investigation attempting to obtain information about the leaders of the campus demonstration." *Ibid.* The Board also affirmed the IJ's "alternative finding that [petitioner's] single detention of 14 hours did not rise to the level of persecution." *Ibid.*

Finally, the Board concluded that the IJ "correctly denied protection under the Convention Against Torture, where [petitioner] failed to establish that he would more likely than not face torture by or with the acquiescence * * * of a member of the government of Egypt upon return to Egypt." Pet. App. 8. The Board determined that "[a]lthough [petitioner] argues on appeal that he was threatened with torture during his arrest and detention in 1996, he has failed to establish that Egyptian authorities would more likely than not torture him if he were returned to Egypt today." *Ibid.*

4. The court of appeals denied the petition for review. Pet. App. 1-2. The court noted that petitioner argued that "he demonstrated past persecution and a

well-founded fear of future persecution as a result of his activities in the Muslim Brotherhood," a "government-banned political group." *Id.* at 2. The court acknowledged that petitioner had been detained once for 12 to 14 hours and was beaten during that detention. *Ibid.* But the court observed that petitioner had not been bothered again during the three-month period between his detention and his departure from Egypt, that he had not associated with any Muslim Brotherhood members since his arrival in the United States, and that "there is at least a small minority of parliamentary members in Egypt who sympathize with the [Muslim Brotherhood]." *Ibid.* In addition, the court noted that, at the time of petitioner's hearing, his mother still lived in Alexandria, Egypt (where petitioner had lived) and his sister in Cairo. *Ibid.* Accordingly, the court of appeals held that the Board's determination that petitioner failed to qualify for withholding of removal was "supported by substantial evidence, and the record does not compel a contrary conclusion." *Ibid.* (citing *Roy* v. *Ashcroft*, 389 F.3d 132, 138 (5th Cir. 2004); *Efe* v. *Ashcroft*, 293 F.3d 899, 906 (5th Cir. 2002); 8 C.F.R. 208.16(b)).

The court of appeals also upheld the Board's determination that petitioner did not qualify for protection under the CAT. It noted that "[b]ecause [petitioner] has not shown that he is entitled to withholding of removal, he has not demonstrated that he can meet the higher standard for obtaining relief under the CAT." Pet. App. 2 (citing *Efe*, 293 F.3d at 907).

ARGUMENT

Petitioner contends (Pet. 7) that the definition of "persecution" used by the court of appeals conflicts with the definitions adopted by other circuits. This claim

lacks merit. The decision below is correct and does not address the issue raised by petitioner. Moreover, any potential tension between these definitions may be resolved by the court of appeals in a future case and does not affect the outcome of petitioner's case. Petitioner also contends (Pet. 12) that the Fifth Circuit's treatment of his CAT claim conflicts with decisions of other circuits. There is no such conflict, and petitioner's claim is meritless in any event. No further review is warranted.

1. a. The court of appeals correctly upheld the Board's determination that petitioner failed to qualify for withholding of removal. As noted above, an applicant who seeks withholding of removal must show that it is more likely than not that he would be subject to persecution on account of a protected category upon removal to a particular country. 8 C.F.R. 1208.16(b); *INS* v. *Stevic*, 467 U.S. 407, 429-430 (1984). An applicant's showing that he "suffered past persecution in the proposed country of removal on account of" a protected category gives rise to a rebuttable presumption that he would face future persecution. 8 C.F.R. 1208.16(b)(1)(i). The factual determination by an IJ or the Board that an applicant is ineligible for withholding of removal is reviewed under the deferential "substantial evidence" standard, under which the determination must be upheld "unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992).

Applying this standard, the court of appeals correctly upheld the Board's finding that petitioner's single incident of detention did not rise to the level of past persecution. The court of appeals has described persecu-

tion as treatment that is "excessive or arbitrary" and includes "severe beatings." *Abdel-Masieh* v. *United States INS*, 73 F.3d 579, 584 (5th Cir. 1996) (quoting *In re Laipenieks*, 18 I. & N. Dec. 433, 459 n.18 (B.I.A. 1983), rev'd on other grounds, 750 F.2d 1427 (9th Cir. 1985)). Here, the court of appeals observed that petitioner was "detained once for a 12- to 14-hour period and was beaten during his detention." Pet. App. 2. Petitioner did not, however, seek medical treatment or hospitalization for any injuries. App., *infra*, 7a. Moreover, as the court of appeals noted, petitioner continued to live in Egypt without incident for three months after his detention; his mother continued to live in Alexandria (where petitioner had lived), and his sister in Cairo. Pet. App. 2. In light of these facts, the court of appeals properly held that the Board's determination was "supported by substantial evidence, and the record does not compel a contrary conclusion." *Ibid.* (citing, among other authorities, *Roy* v. *Ashcroft*, 389 F.3d 132, 138 (5th Cir. 2004)).

Petitioner's claim for withholding of removal fails for the additional reason that he failed to establish that the SSI harmed him on account of his membership in the Muslim Brotherhood. As the Fifth Circuit has explained, "[t]here must be some particularized connection between the feared persecution and the alien's race, religion, nationality or other listed characteristic." *Roy*, 389 F.3d at 138 (internal quotation marks omitted). In this case, the Board observed that petitioner was "mistreated by SSI security agents who were seeking information regarding leaders of the Muslim Brotherhood who had held a demonstration on the college campus where [petitioner] attended university and in which [petitioner] had participated." Pet. App. 7. But, the Board

explained, the record "does *not* contain any evidence that [petitioner] was questioned by the SSI or any other governmental authority regarding his political opinions." *Id.* at 6 n.1. Rather, petitioner's "mistreatment occurred within the context of the agents' investigation attempting to obtain information about the leaders of the campus demonstration." *Id.* at 7. Given these facts, the Board found that petitioner failed to establish a "nexus" between his mistreatment and his political beliefs. *Id.* at 6. On review, the court of appeals did not expressly address this nexus issue, but it did generally reject petitioner's challenge to the Board's determination. *Id.* at 2. Moreover, it is plain that the record does not compel a contrary conclusion, especially given the lack of any evidence that petitioner was questioned about his political beliefs.

b. Petitioner contends that the Fifth Circuit's definition of "persecution" set forth in *Roy*, 389 F.3d at 138, conflicts with the definitions adopted by other courts of appeals because those courts have not required that an alien prove that his "persecutor was motivated by a desire to 'punish' him" or that his persecutor "sought to overcome a belief or characteristic held by the alien." Pet. 7. This issue was not addressed by the court of appeals and thus does not warrant review. Contrary to petitioner's suggestion (Pet. 4), the court of appeals did not rely on its prior decision in *Roy* for a definition of persecution. Rather, the court of appeals merely cited *Roy* for the proposition that the Board's factual determinations must be upheld if "supported by substantial evidence, and the record does not compel a contrary conclu-

sion." Pet. App. 2 (citing *Roy*, 389 F.3d at 138).[2] The decision in *Roy*, in turn, states that factual findings are reviewed for "substantial evidence" and may be reversed only "when the evidence is 'so compelling that no reasonable fact finder could fail to find' the petitioner statutorily eligible for relief." 389 F.3d at 138 (quoting *Elias-Zacarias*, 502 U.S. at 483-484). Although the decision in *Roy* also contains a discussion of the term "persecution," there is no indication that the court of appeals relied on that aspect of the decision here. In fact, the decision below contains no discussion whatsoever of whether "persecution" specifically requires an intent to "punish." Pet. App. 2. This Court generally declines to decide issues that "were not addressed by the Court of Appeals," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and there is no reason to depart from that general rule here.

In any event, there is no direct conflict between the decision in *Roy* and the cases cited by petitioner. In *Roy*, the Fifth Circuit noted that persecution "has been construed as requiring a showing" by the alien "that 'harm or suffering will be inflicted upon [him] in order to punish [him] for possessing a belief or characteristic a persecutor sought to overcome." 389 F.3d at 138 (quoting *Faddoul* v. *INS*, 37 F.3d 185, 188 (5th Cir. 1994)). Although this language standing alone could suggest a requirement of intent to punish, the Fifth Circuit went on to explain that this showing simply requires "*some* particularized connection between the feared persecution and the alien's race, religion, nationality or other listed characteristic." *Ibid.* (quoting *Faddoul*, 37

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[2] The court of appeals also cited *Efe* v. *Ashcroft*, 293 F.3d 899, 906 (5th Cir. 2002), for this "substantial evidence" standard. Pet. App. 2. That case does not even provide a definition of persecution.

F.3d at 188) (emphasis added). That is, the alien must "present specific, detailed facts showing a good reason to fear that he or she will be singled out for persecution" on a protected ground. *Ibid.* (quoting *Faddoul*, 37 F.3d at 188).

That holding does not conflict with the cases cited by petitioner. Many of the cases petitioner cites merely describe the type of "extreme conduct" (Pet. 8) that rises to the level of persecution. See *Orelien* v. *Gonzales*, 467 F.3d 67, 71 (1st Cir. 2006); *Nikijuluw* v. *Gonzales*, 427 F.3d 115, 120 (1st Cir. 2005); *Gilaj* v. *Gonzales*, 408 F.3d 275, 284 (6th Cir. 2005); *Sepulveda* v. *United States Att'y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005); *Chen* v. *United States INS*, 359 F.3d 121, 128 (2d Cir. 2004); *Guan Shan Liao* v. *United States Dep't of Justice*, 293 F.3d 61, 67, 70 (2d Cir. 2002); *Fatin* v. *INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). Those decisions are not inconsistent with the finding that petitioner's single detention, which resulted in no medical treatment or hospitalization, did not constitute persecution.

The other cases that petitioner cites involved definitions of persecution that, while worded somewhat differently, are generally consistent with the Fifth Circuit's requirement of "some particularized connection" between harm or suffering and a protected ground. See *Rife* v. *Ashcroft*, 374 F.3d 606, 612 (8th Cir. 2004) ("'Persecution is the infliction or threat of death, torture, or injury to one's person or freedom' on account of a statutory ground such as religion."); *Chaib* v. *Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005) ("Persecution is 'the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive and requires more than just restrictions or threats to life and liberty.'"); *Bace* v. *Ashcroft*, 352 F.3d

1133, 1137 (7th Cir. 2003) ("This Circuit has defined persecution as punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.") (internal quotation marks omitted); *Fisher* v. *INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (defining persecution as "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive") (internal quotation marks omitted).

Any possible tension between those definitions and the one in *Roy* does not warrant this Court's review. As petitioner concedes (Pet. 6), the Fifth Circuit has also adopted a definition of persecution that does not refer to punishment. See *Abdel-Masieh*, 73 F.3d at 583 (defining persecution as "[t]he infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (*e.g.*, race, religion, political opinion, etc.), in a manner condemned by civilized governments") (quoting *In re Laipenieks*, 18 I. & N. Dec. at 456-457). To the extent, if any, that this definition is inconsistent with the one in *Roy*, such an intracircuit conflict is a matter for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

c. Finally, review in this case is not warranted for the additional reason that resolution of the question petitioner raises would not affect the outcome of this case. Even if petitioner were correct that the panel applied a standard of persecution drawn from *Roy* and that a different standard should apply, he would still not be entitled to withholding of removal. As explained above, the court of appeals correctly upheld the Board's determination that the mistreatment experienced by petitioner was not severe enough to constitute persecution. Pet.

App. 2, 7. Moreover, petitioner failed to establish the requisite "nexus" between his mistreatment and his membership in the Muslim Brotherhood. *Id.* at 7. Given these deficiencies in petitioner's claim, a decision by this Court on the question raised in the petition would have no effect on his eligibility for withholding of removal.

2. Petitioner also contends (Pet. 12) that the Fifth Circuit's treatment of his CAT claim as a "subset of his application for withholding of removal" conflicts with decisions from other circuits. In this regard, petitioner takes issue with the court's determination that "[b]ecause he has not shown that he is entitled to withholding of removal, he has not demonstrated that he can meet the higher standard for obtaining relief under the CAT." Pet. App. 2. Petitioner claims that this unpublished decision conflicts with those of other circuits that recognize that a CAT claim should be analyzed separately from a claim for asylum or withholding of removal. Pet. 12-13 (citing *Kamalthas* v. *INS*, 251 F.3d 1279 (9th Cir. 2001); *Zubeda* v. *Ashcroft*, 333 F.3d 463 (3d Cir. 2003)).

This argument lacks merit. Contrary to petitioner's claim, the decision below does not conflict with those of other circuits. In affirming the Board's denial of CAT relief, the court of appeals cited its prior decision in *Efe* v. *Ashcroft*, 293 F.3d 899, 907 (5th Cir. 2002). Pet. App. 2. In *Efe*, the Fifth Circuit specifically stated that "[t]he Convention Against Torture claim is separate from the claims for asylum and withholding of removal and should receive separate analytical attention." 293 F.3d at 906-907. To support that proposition, the Fifth Circuit cited *Kamalthas*, *supra*, one of the very cases that petitioner claims conflicts with the decision below. *Efe*, 293 F.3d at 907. The court of appeals explained in *Efe* that a CAT

claim, unlike a claim for asylum or withholding of removal, does not require a nexus to a protected ground and that "[a]nother difference is that CAT does not require persecution, but the higher bar of torture." *Ibid.*

Here, the court of appeals simply determined that petitioner failed to establish that he would be subject to torture given that his single incident of past detention was not even severe enough to constitute persecution. The court did not hold in any way that a CAT claim is merely a "subset" of a withholding of removal claim. Thus, petitioner's claim is essentially a fact-bound disagreement with the court's conclusion and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
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Attorneys

MARCH 2011

APPENDIX

U.S. Department of Justice
Executive Office for
Immigration Review

Immigration Court

El Paso, Texas

Date: [Jan. 15, 2008]

File: A 78 524 720 - El Paso

In re: WAEL MOHAMED ABDEL-LATIF,

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:
MARLENE GONZALEZ, ESQUIRE
912 McGaughan Avenue
El Paso, Texas 79901

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
WILLIAM M. HUNT, ESQUIRE
1545 Hawkins Boulevard
El Paso, Texas 79925

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act—visa overstay.

APPLICATION: Form I-589, application for withholding of removal pursuant to Section 241(b)(3) of the Immigration and Nationality Act and withholding of re-

moval under the United Nations Convention Against Torture.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 32 year old married citizen and national of Egypt. He entered the United States on or about July 28, 1996 at JFK airport in New York with a B-1 visitor's visa. Respondent subsequently overstayed his visitor's visa. On January 8, 2007 the respondent appeared before this Court and admitted the factual allegations in the Notice to Appear and conceded removability as charged (Exhibit 1). The Court is satisfied that removability has been established in this case by clear and convincing evidence. [*Woodby*] *vs. INS*, 385 U.S. 276 (1966).

FACTS

Prior to considering testimony in this case the Court admitted and considered the following exhibits:

(1) The Notice to Appear with recorded pleadings.

(2) Form I-589.

(3) State Department country report for the country of Egypt.

(4) State Department profile for the country of Egypt.

(5) Respondent's group exhibits identified by Tabs 1 through 6.

(6) Respondent's exhibit consisting of a public statement published by Amnesty International.

(7) Government form I-213 relating to the respondent.

The respondent, as noted, is a married citizen of Egypt. The respondent's testimony and application reflects that he was born in the country of Egypt and attended school in that country. In the year 1994 the respondent joined a social and political organization known as the Muslim Brotherhood. After joining[,] the respondent attended meetings which were held at a mosque, apparently near the campus of the University of Alexandria where the respondent was a student.

The respondent reports no difficulties with any government officials during wh[at] was approximately the first 2 years of his party membership. In April of the year 1996 the respondent reports participating in a rally or a march which was conducted on the campus of the University of Alexandria. The march was organized by the Muslim Brotherhood and apparently took place only on the campus. After the end of the rally the respondent returned to his home without incident.

The following day the respondent's narrative (Exhibit 5, Tab 1) and his testimony reflect that he was arrested by government agents and taken to a government office which he identified as belonging to the SSI. The respondent described being threatened, beaten, interrogated, and shackled during what was estimated as a period of 12 to 14 hours of detention.

Approximately 2 and a half months later the respondent applied for and was issued an Egyptian passport. The respondent then applied at the State Department Consulate and was granted a U.S. visitor's visa. The respondent left Egypt in July of 1996 and has not returned to the country since.

APPLICABLE LAW

Section 208(a)(2)(B) of the Act provides that an application for asylum must be filed within 1 year of the applicant's entry into the United States. Section 208(a)(2)(B) provides for a tolling of that time limitation upon the showing of extraordinary circumstances which resulted in a delay of the filing.

Section 241(b)(3) of the Immigration and Nationality Act provides that an alien shall not be removed to a country if the alien's life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group or political opinion. In order to establish eligibility for withholding an alien has the burden of showing that it is more likely than not that they will be persecuted on account of one of the five statutory grounds mentioned above. *INS vs. Stevic*, 467 U.S. 407 (BIA 1984).

Under the United Nations Convention Against Torture an applicant has the burden of proof to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. Section 1208.18(a)(1) defines torture as any act by which severe pain or suffering is intentionally inflicted on a person, when inflicted at the instigation of or with the acquiescence of a public official. Section 1208.18(a)(7) requires that the acquiescence of the public official be with prior knowledge of the activity and involve a breach of a legal duty to prevent said activity. Section 1208.18(a)(2) defines torture as involving only the most extreme forms of cruel and inhumane treatment and not including other lesser forms of cruel and inhumane treatment.

APPLICATION OF THE LAW TO THE FACTS

Section 208(b)(1)(B)(ii) provides that the uncorroborated testimony of an applicant may satisfy the burden of proof only if the Court is satisfied that the applicant's testimony is persuasive and refers to specific facts which demonstrate that the alien is in fact a refugee. Section 208(b)(1)(B)(i) places the burden on the applicant to show that one of the five statutory grounds listed in Section 101(a)(42)(A) is or will be at least one central reason for the persecution of the applicant. Sections 240 and 241 of the Act contain similar directives with respect to the evaluation of claims for withholding of removal and all other forms of relief from deportation to include the Convention Against Torture.

The evidence in this case clearly reflects that any claim to political asylum is time barred under Section 208(a)(2)(B) since the respondent did not file his application within 1 year of his arrival in the United States. The respondent has not advanced any exception under paragraph D that would excuse the late filing. Consequently, the Court cannot and will not consider any relief under Section 208 of the Act.

In the respondent's narrative, (Exhibit 5, Tab 1) and his testimony, the respondent explains the problem that his father suffered with the Egyptian government. Respondent also indicated that his father was formally charged with the offense of bribery and, apparently, was convicted after a trial. He served a prison sentence for that criminal violation. The next event described is his membership in the Muslim Brotherhood which occurred 4 years later in the year 1994. As noted, the first 2 years of the respondent's membership and participation in

party activities were uneventful with respect to the involvement of the Egyptian government.

The respondent then describes a demonstration in April of 2006. According to the respondent, the demonstration was conducted on the university campus and involved approximately 100 students. The demonstration apparently ended peacefully and the respondent returned to his home. On the following day he was arrested and held for some 12 to 14 hours. During his incarceration the respondent described being slapped about the neck and face, subjected to vile language, shackled, and repeatedly threatened. He described being requested or ordered to sign a blank paper which he described as being a confession. The respondent was then released from police custody. He was never, according to his testimony, again arrested or harassed by any officer or government official.

Some 2 and a half months later the respondent was issued a passport by the Egyptian government. The United States Government granted him a visitor's visa and he left the country of Egypt permanently in July of 1996. Shortly after his arrival in the United States he engaged in marriage fraud in order to obtain his immigration status. The respondent did not express a fear of returning to Egypt until the filing of his form I-589 with this Court in May of 2007 (Exhibits 2 and 7) .

The first question which concerns the [Court] is whether or not the respondent in fact suffered persecution. Actions can be persecution if the harm or suffering was done to punish an individual for a belief or characteristic which the persecutor seeks to overcome. *Matter of Acosta*, 19 I&N Dec. 211, 223 (BIA 1985).

The evidence when viewed rationally points as strongly to the fact that the SSI officers identified were trying to identify members or organizers of the demonstration rather than to punish the respondent for any belief or any perceived political belief. The testimony in this case does not reflect that the respondent was ever asked about any of his political beliefs or for that matter his role in the organization. What the testimony does reflect is that the police used strong armed tactics to obtain information regarding other members of the organization, their leadership roles[,] and their purposed planning o[f] activities within the organization.

Despite all of the threats described by the respondent, he was released and allowed to return to his home after some 14 hours of detention. None of the injuries which he described resulted in medical treatment or hospitalization. Despite the fact that serious threats were made against the respondent's mother and sister, the evidence does not reflect that after his release any further contact was had between the [SSI, the] respondent, his mother or sister. The testimony and the exhibits are simply insufficient to reflect that the single arrest of this respondent was persecution designed or intended by the persecutor to overcome any characteristic or belief, political or otherwise. While this Court cannot and does not condone the interrogation and investigation techniques of members of the Egyptian government[,] [i]t also cannot determine that the events described were or equate to persecution as that term is legally defined and as that term is binding upon this Court.

Regardless of how viewed, the evidence is insufficient to establish that it is more likely than not that the respondent would suffer persecution on account of one

of the five statutory grounds were he to be returned to the country of Egypt.

This Court must nevertheless consider the respondent's claim for protection under the United Nations Convention Against Torture. The regulations and Board opinions clearly establish that the fear of torture need not be based upon any statutory ground set out in the Act. However, the Board has determined that the Convention Against Torture does not provide protection in cases where the abuse or torture is inflicted by a nongovernmental party who is not acting at the instigation or with the acquiescence of a public official. *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000). Under the regulations, a public official must have prior knowledge of the activity and breach a legal duty to prevent it.

The activities of the Egyptian government aside, Professor Coronado stated that upon return to Egypt this respondent could suffer harm at the hands of what she described as radical Islamic groups or perhaps political parties who espouse the doctrine of radical Islam. The professor offered her opinion that the respondent could suffer reprisal at the hands of such group were his participation or prior membership in the Muslim Brotherhood to become known. The Board has determined that the term "activity" means the very torture or harm that the applicant claims to fear. At no time in his testimony did the respondent express a fear of reprisal or harm from any radical Islamic group within the country of Egypt. The 5th Circuit has determined that the failure to apprehend persons threatening a claimant under the Convention Against Torture or the lack of financial resources to eradicate the threat or risk of torture to such an applicant does not constitute sufficient state

action for the purpose of relief under the Convention Against Torture. *Tamara-Gomez v. Gonzales*, 447 F.3d 343 (5th Circuit 2006). In that opinion the Fifth Circuit stated that the inability to provide security within a country likewise does not rise to the level of state action required for relief under the Convention Against Torture. Unless the failure to provide security is knowing and deliberate, no claim can be made under the Convention Against Torture. For these reasons, any claim based upon reprisal from radical Islamic groups within the country of Egypt must fail.

As noted, the Convention Against Torture deals with acts of torture inflicted by the government or parties acting with the consent or acquiescence of the government. A strong indicator as to the fear of future torture is the past experience of the applicant. In this case, what the respondent has described cannot be considered as torture as that term is defined under the regulations. As noted, torture is defined as only the most extreme forms of cruel and inhumane treatment. None of the injuries described resulted in medical treatment or hospitalization. The testimony reflects extreme efforts on the part of the SSI officers to use fear as a motivating factor in order to obtain information from the respondent.

Since what the respondent experienced in the past does not amount to torture under the regulations, the Court must consider whether or not the respondent has met his burden of establishing that it is more likely than not that he would suffer torture if returned to the country of Egypt some 11 years after his one 14 hour incarceration. Professor Coronado stated only the possibility that the respondent might suffer at the hands of the

Egyptian government. Unfortunately, the professor did not indicate to what level or what degree the persecution might proceed to. The professor did not offer an opinion that the respondent would suffer torture, as that term is defined, were he to be returned to the country of Egypt. Furthermore, the possibility of persecution or harm does not satisfy the burden of more likely than not. For these reasons the respondent has not met his burden of proof and his claim for protection under the Convention Against Torture must fail.

ORDERS OF THE COURT

The respondent's application for political asylum pursuant to Section 208 of the Immigration and Nationality Act is time barred and not considered by the Court.

The respondent's application for withholding of removal pursuant to Section 241(b)(3) of the Immigration and Nationality Act is hereby DENIED.

The respondent's application for relief under the United Nations Convention Against Torture is hereby DENIED.

The respondent is ordered removed to the country of Egypt which is the country of his nativity and present citizenship.

/s/ THOMAS C. ROEPKE
THOMAS C. ROEPKE
U.S. Immigration Judge
El Paso, Texas

CERTIFICATE PAGE

I hereby certify that the attached proceeding before THOMAS C. ROEPKE in the matter of:

WAEL MOHAMED ABDEL-LATIF

A 78 524 720

El Paso, Texas

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Jua Howard (Transcriber)
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Mar. 11, 2008
(Completion date)

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No. 10-557

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In The

Supreme Court of the United States

WAEL MOHAMED ABDEL-LATIF,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, petitioner addresses the following new points raised in the brief in opposition ("brief") filed by Respondent Eric Holder.

I. Respondent's first question for review does not fairly address the substance of Petitioner's first question for review, but rests on grounds which the Supreme Court has expressly stated will rarely result in the grant of review

Supreme Court Rule 24.2 authorizes a respondent to present its own question(s) for review if dissatisfied with the petitioner's question(s). Respondent substitutes the following question as a question for that of Petitioner:

> Respondent's Question #1
>
> "Whether the court of appeals correctly held that substantial evidence supported the determination by the [BIA] that petitioner failed to establish eligibility for withholding of removal under the [INA]"
>
> Petitioner's Question #1
>
> "Whether the United States Court of Appeals for the Fifth Circuit erred in defining the term 'persecution,' as used in 8 U.S.C. §1101(a)(42)(A), to mean harm or suffering done to punish an individual for a belief or characteristic which the persecutor seeks to overcome"

Respondent's first question for review does not fairly address the substance of Petitioner's first question for review and should be disregarded. Because Respondent's question and his brief in general primarily focus on the underlying fact findings in Petitioner's case and how properly stated law should apply, his question also disregards Supreme Court Rule 10, which states that a petition "is rarely granted when the asserted error consists of factual findings or the misapplication of a properly stated rule of law."[1]

II. Respondent's suggestion that "persecution" cannot occur where a single detention occurs over a several hour period and the detained person does not suffer serious bodily injury oversimplifies the meaning of the term "persecution," as used in the INA

In footnote 7 of *I.N.S. v. Stevic*, 467 U.S. 407, at 414 (1984), the Supreme Court observed that "Section 243(h) of the INA of 1952 [was] amended by striking out the words 'physical persecution' and inserting in lieu thereof 'persecution on account of race, religion, or political opinion.'" This amendment clarified that a showing of physical injury is not necessary to prove "persecution" under the withholding of removal and

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[1] As Supreme Court Chief Justice Fred Vinson stated more than sixty years ago, "[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." See *Vinson, Work of the Federal Courts, ADDRESS BEFORE THE ABA* (Sept. 7, 1949).

asylum statutes. The conduct of the SSI agents who threatened to torture Petitioner and his family and to arrest Petitioner on bogus drug charges if he did not cooperate with their interrogation procedure by informing them of the activities and identities of members of the Muslim Brotherhood (AR 137-147) represents the sort of extreme conduct that would fall within the definition of "persecution." See e.g. *Nikijuluw v. Gonzalez*, 427 F.3d 115, 120 (1st Cir. 2005); *Guan Shan Liao v. U.S. Dept. of Justice*, 293 F.3d 61, 67 (2nd Cir. 2002); and *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc).

III. Respondent's brief mischaracterizes Petitioner's complaint as that of being persecuted because of political opinion, when the allegations made by Petitioner in his writ petition reflect that his complaint is directed solely to persecution he suffered on account of his membership in the "Muslim Brotherhood"

In his petition (at page 3), Petitioner asserted: "The evidence relied on by the BIA established that Abdel-Latif, a past member of the Muslim Brotherhood, was detained, continually beaten, and threatened for a 12-14 hour period by SSI officers . . . because of his participation in a rally on the Alexandria college campus organized by the Muslim Brotherhood," a peaceful political organization which has for many years been outlawed by the Egyptian Government. Petitioner limited his claim of being "persecuted"

to the protected ground of being a member of a social group known as the Muslim Brotherhood. *Id.* Nowhere in his petition did he assert that he was persecuted based on a political opinion. Even though Respondent acknowledges that Petitioner bases his writ petition on a complaint of persecution based on his past membership in the Muslim Brotherhood (Respondent's brief, page 4), he nonetheless maintains that Petitioner is not eligible for withholding of removal because the record "does not contain any evidence that [Petitioner] was questioned by SSI . . . regarding his political opinions" and because Petitioner "failed to establish a 'nexus' between his mistreatment and his political beliefs." (See Respondent's brief, at p. 11). These arguments by Respondent are not germane to the question presented since Petitioner asserts in this petition only that he was "persecuted" on account of his membership in the Muslim Brotherhood and makes no claim of having been persecuted for "political opinion."

IV. Respondent disregards the way "persecution" is defined in *Roy v. Ashcroft* in an effort to avoid the conflict which exists between the way the Fifth Circuit has defined the term and the way other courts of appeals have defined it

On page 12 of his brief, Respondent disregards the manner in which "persecution" is defined in *Roy v. Ashcroft,* 389 F.3d 132 (5th Cir. 2004). As Respondent correctly observes, "the Fifth Circuit [in *Roy*]

noted that persecution 'has been construed as requiring a showing' by the alien 'that harm or suffering will be inflicted upon [him] in order to punish [him] for possessing a belief or characteristic a persecutor sought to overcome.'" *Id.* However, Respondent then argues in the next sentence of his brief that the Fifth Circuit in *Roy* "went on to explain that this showing simply requires 'some particularized connection between the feared *persecution* and the alien's race, religion, nationality or other listed characteristic.'" *Id.* (emph. added). This is an inaccurate reading by Respondent of this part of the *Roy* opinion. Unlike Respondent asserts, nothing in the Fifth Circuit's reference to the requirement that there be a "particularized connection" between persecution and one of the five protected grounds alters or modifies the express definition of "persecution" the Fifth Circuit adopted in *Roy*.

Another problem with Respondent's analysis is its failure to recognize that the "persecution" definition set forth by the Fifth Circuit in *Roy* is exclusive. By "***requiring*** a showing" by the alien "that harm or suffering will be inflicted upon [him] in order to punish [him] for possessing a belief or characteristic a persecutor sought to overcome," the Fifth Circuit has created a litmus test which must be met in each and every case before an alien can demonstrate his entitlement to asylum or withholding relief. See *Roy v. Ashcroft*, at 138 (emph. added). This litmus test is set at such a high level by the Fifth Circuit's "persecution" definition that many aliens who could otherwise

prove a case of "persecution" in any of the other courts of appeals will be unable to prove that they were "persecuted" under this Fifth Circuit test. Respondent's assertion that "this showing [i.e. "persecution"] simply requires 'some particularized connection between the feared persecution'" and one of more protected grounds is simply not a correct or accurate statement of the law stated in *Roy*. (Respondent's brief, at 12). Nothing in the *Roy* opinion supports this contention made by Respondent. *Roy*, supra at 138.

V. Respondent's argument that the Fifth Circuit did not rely on its prior decision in *Roy v. Ashcroft* for a definition of "persecution" is without merit

Respondent asserts on page 11 of his brief that "Contrary to petitioner's suggestion (Pet. 4), the court of appeals did not rely on its prior decision in *Roy* for a definition of persecution." This argument is without merit. Respondent fails to recognize that the "persecution" definition Petitioner complains of was relied on throughout the proceedings in this case. Both the IJ and the BIA utilized the same definition of "persecution," with the BIA specifically holding that the IJ was correct in its determination that [petitioner's] single detention of 14 hours did not rise to the level of persecution. (See Respondent's brief, at 7). Respondent acknowledges that this "persecution" definition was used at the IJ level on page 5 of his brief, stating: "The IJ thus determined that '[t]he testimony and exhibits are simply insufficient to reflect that the single arrest of [petitioner] was persecution designed

or intended to overcome any belief or characteristic or belief, political or otherwise." The incorrectness of the *Roy* "persecution" definition was also specifically argued by Petitioner at pages 22-23 of his merits brief to the Fifth Circuit. Accordingly, because the record amply reflects that the Fifth Circuit based its analysis on the same erroneous definition of "persecution" that the IJ and BIA relied on in denying Petitioner relief on his withholding of removal claim – even though informed that this definition was erroneous – it cannot be said that the Fifth Circuit did not consider the "persecution" definition Petitioner complained of, as set out in *Roy*.[2]

Respondent's argument that there is no indication that the Fifth Circuit relied on the "persecution" definition set out in *Roy* is also without merit. (See Respondent's brief, at 12). As Respondent concedes on pages 2-3 of his brief, the issue of Petitioner's entitlement to withholding of removal relief necessarily required a legal determination of whether Petitioner was "persecuted" on account of a protected ground. Consequently, the Fifth Circuit had to apply some definition of "persecution" in order to address Petitioner's

---

[2] Respondent's reliance on *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (see p. 12 of his brief) in arguing that the issue asserted in this petition was not before the Fifth Circuit is misguided. In *Cutter*, this Court refused to address petitioner's Spending and Commerce Clause arguments because the Sixth Circuit had confined its analysis to the Establishment Clause violation. Here, the Fifth Circuit squarely rejected Petitioner's argument that the BIA and the IJ had improperly denied withholding of removal relief by relying on an erroneous definition of "persecution."

withholding of removal claim. Respondent therefore cannot properly say that the definition of "persecution" was not an issue in Petitioner's case. The Fifth Circuit's citation to *Roy* as establishing that substantial evidence supported the BIA's determination that Petitioner was not "persecuted" is by itself strong if not conclusive proof that the Fifth Circuit relied on the "persecution" definition set out in *Roy*. (See *Roy*, at 138).

Respondent's argument further ignores the general nature of the Fifth Circuit's citation to *Roy*, in that this cite was not to a specific point of law, but general in scope. Respondent's argument also erroneously assumes that the Fifth Circuit was unaware of the "persecution" definition set forth in *Roy* when it decided Petitioner's case.

IV. Respondent, without good reason, refuses to acknowledge that in the Fifth Circuit an alien must show that harm or suffering will be inflicted upon him in order to punish him for possessing a belief or characteristic the persecutor sought to overcome before a case of "persecution" is proven

Respondent attempts but fails to undermine the validity of the Fifth Circuit's definition of "persecution" in *Roy* by citing to other language in that decision. (Respondent's brief, at 12). Although Respondent is correct in observing that not all courts of appeals have defined "persecution" as an isolated term and that some courts have included within the definition the "on account of" language set out in the

"refugee" definition of the INA, he fails to recognize that these courts of appeals, by tracking this nexus language, have provided a workable, consistent definition of "persecution." (Respondent's brief, at 13-14). The Fifth Circuit's definition of "persecution," on the other hand, stands alone. Its "persecution" definition not only fails to track the language in the asylum and withholding of removal statutes, but it imposes much more stringent proof requirements on the alien than the proof requirements its sister courts of appeals have imposed. (See, e.g., *Rife v. Ashcroft*, 37 F.3d 606, 612 (8th Cir. 2004). In these other courts of appeals, a plain meaning rule analysis is applied in determining whether relief should be granted. *Id.* The only proof needed is the proving of a nexus between the harm or suffering the alien endures and one of the listed protected grounds. *Id.* Under the Fifth Circuit's "persecution" test, however, the only type of persecution recognized is "harm or suffering . . . inflicted upon the alien in order to punish [him] for possessing a belief or characteristic a persecutor sought to overcome." See *Roy v. Ashcroft*, at 138 (emph. added).

The Fifth Circuit "persecution" definition thus imposes a completely different burden of proof than what is contemplated by ascribing a plain and ordinary meaning to the term "persecution," as used in the asylum and withholding of removal statutes. The Fifth Circuit's very narrow, yet all-encompassing definition of "persecution" therefore cannot be reconciled with the substantially similar "persecution" definition other courts of appeals have applied in deciding

whether an alien should be granted relief on an asylum or withholding claim.

CONCLUSION

The "persecution" definition adopted by the Fifth Circuit, aside from being completely different from the "persecution" definition adopted by most if not all of the other courts of appeals, imposes a burden of proof which many aliens pursuing asylum or withholding of removal claims will not be able to meet, even if they otherwise qualify for such relief. In particular, those aliens persecuted because of an immutable characteristic, such as race or nationality, will not qualify for withholding or asylum relief because they will not be able to show that the immutable characteristic they possess is a characteristic which the persecutor sought to change or overcome. This Court should therefore declare invalid the "persecution" definition adopted by the Fifth Circuit in *Roy* and in the BIA decisions Respondent cites to in his brief. Taking such action is necessary since the definition of "persecution" utilized in *Roy,* which originated from dicta in the BIA decision of *In re Acosta*, 19 I & N Dec. 211 (B.I.A. 1985), has injected considerable conflict and confusion in the body of law

relating to the way the asylum and withholding of removal statutes are applied.

Respectfully submitted,

JAMES D. LUCAS
Counsel of Record